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No.

In The Supreme Court of the United States

October Term, 1985

JACK NATHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK NATHAN
Petitioner Pro Se
201 East 16th Street
New York, New York
(212) 533-3300

Dick Bailey Printers. 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTION PRESENTED

Did the conduct of defense counsel and his blatant conflict of interest constitute ineffective assistance of counsel under the criteria of *Strickland v. Washington* so as to violate petitioner's Fifth and Sixth Amendment Rights?

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In The Supreme Court of the United States

JACK NATHAN,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Jack Nathan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 20, 1986.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the denial of Petitioner's Writ of *Coram Nobis* seeking to set aside a judgment of conviction. A copy of the memorandum is attached as Appendix A. The memorandum decision was rendered on November 21, 1985.

The Court of Appeals denied petitioner's petition for a rehearing and suggestion for a rehearing *en banc* on March 20, 1986. A copy of the order is attached as Appendix B.

JURISDICTION

On November 21, 1985, the Court of Appeals entered judgment affirming the denial of petitioner's of *Coram Nobis* to set aside the judgment of conviction against petitioner. (App. A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1245(1). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On October 9, 1975, petitioner was convicted by a jury of four counts of tax evasion for the years 1967 to 1970, and sentenced by the trial court, Bonsal, U.S.D.J. (S.D.N.Y.) on December 8, 1975, to serve concurrent nine month prison terms and to pay a fine of $40,000.00. On June 16, 1976, the Court of Appeals for the Second Circuit affirmed said judgment, 536 F.2d 988 (1976) and, on August 6, 1976 denied a petition for rehearing. Certiorari was denied by the United States Supreme Court on November 1, 1976. 429 U.S. 930 (1976). The petitioner thereupon, following the denial by the trial judge on December 26, 1985 of a motion pursuant to 28 U.S.C. 2255, served the prison term and paid the fine imposed upon him. On or about June 21, 1984 the petitioner filed and served a petition for a writ of error *coram nobis* seeking to set aside the judgment of conviction. By order dated July 14, 1984, the petition was assigned to Hon. John E. Sprizzo, U.S.D.J. who referred same to United States

Magistrate Leonard Bernikow for review and recommendation. On June 21, 1985, the said Magistrate recommended that the petitioner's petition be denied without a hearing. On July 15, 1985, the District Court dismissed the petition, overruling petitioner's objections to the Magistrate's report. The petitioner fully and timely appealed to the United States Court of Appeals for the Second Circuit which affirmed the dismissal of petitioner's petition for a writ of *coram nobis.* A timely petition for rehearing and for a rehearing *en banc* was filed and said petition was denied on March 20, 1986.

REASON FOR GRANTING THE WRIT

WHERE PETITIONER HAS BEEN DENIED REASONABLE EFFECTIVE ASSISTANCE OF COUNSEL WHO IS ENCUMBERED WITH A CONFLICT OF INTEREST, DUE PROCESS DEMANDS THAT HIS CONVICTION BE SET ASIDE.

In *Strickland v. Washington,* this Court establishes the standard of "Reasonably Effective Assistance." It is the contention of the petitioner, that the conduct of trial counsel fell far below any objective standard of reasonableness and therefore violated the petitioner's right to due process.

At the petitioner's trial part of the Government's proof related to the allegation that petitioner had, during the tax years in question, cashed checks of his family owned collection agency at various hotels in New York City which were clients of the collection agency, and that the petitioner failed to report the proceeds of the checks cashed.

Credit managers from three hotels testified as prosecution witnesses to the effect that they were aware of the cashing of the checks in question and they were cross-examined as to whether the petitioner had used the funds in entertaining them and other business contacts.

Two of the three credit managers acknowledged receiving payments from the petitioner, admitting they received substantial cash payments, and testified that the giving of such gratutities was a practice or custom in the collection business. The third credit manager, Leonard J. Groppe, reluctantly admitted he had received gifts at holidays but otherwise denied having received payments from the petitioner.

> However, the tape was only temporarily excluded during petitioner's cross-examination of Groppe pending proper identification of the scope and contents of the tape. It is quite plainly within the trial court's discretion to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a lengthy, awkward in-court attempt to straighten matters out, here selecting portions of a tape for playback. The defense was invited to offer the tape again whenever it had ascertained what portions of what conversations on the tape it had sought to have admitted into evidence. The defense's omission to make a subsequent offer deprives it of grounds for attacking the trial court ruling on this appeal. Any error, had there been one, was rendered harmless by the open opportunity to offer the tape once it was properly prepared for use. See United States v. Badalamente, 507 F.2d 12, 22 (2nd Cir. 1974), cert. denied, 421 U.S. 911.

536 F.2d at 991-992.

Following the conclusion of petitioner's trial, his trial attorney associated himself with petitioner's counsel to prepare petitioner's brief for this Court. Either out of deference to trial counsel or in view of the then-prevailing standard to be employed in determining the issue of ineffective assistance of counsel, as enunciated in *United States v. Wight,* 176 F.2d 376 (2nd Cir. 1949) ("farce and mockery" standard), and its progeny or both, no such question was raised on appeal. Instead, as previously indicated, the only issue pertaining to the tape recording in question was the alleged refusal of the trial judge to admit it at a particular time in the proceedings, a contention rejected by the Second Circuit which held that the trial counsel had rejected an "open opportunity to offer the tape once it was properly prepared for use." 536 F.2d at 992.

In fact, Groppe had falsely told the Internal Revenue Service, in order to explain certain payments that had been made to him by petitioner, that he had done ir dependent collection work for him. Defense trial counsel, Louis Bender, had in his possession a tape recording of a conversation between Groppe and petitioner in which Groppe had admitted, *inter alia,* that this statement to the Internal Revenue Service "wasn't true." When Mr. Bender sought to play the tape recording to Groppe during cross-examination to contradict Groppe's flat denial of this admission, the jury was excused at the prosecutor's request, and the court and counsel heard the tape several times. Since only a portion of the conversation appeared to be recorded, the trial judge excluded the evidence, stating that he would permit it only "if during the defendant's case you get this straightened out."

On subsequent occasions during the trial, when the question was raised again, the court stated that "a proper

foundation" would be required if the recording were played during the defense case, and that he did not see "what relevance" the taped conversation had to the issues at trial.

At the close of the prosecution's case, the defense rested, without calling any witnesses. The recording was never played.

During its deliberations, the jury requested the tape. This request was denied, and the jury was informed that the tape had never been introduced into evidence.

Upon appeal petitioner contended that the tape conversation between Groppe and him had been improperly excluded by the trial judge. This Court, in rejecting this contention, stated as follows:

However, when this court adopted the "reasonably effective assistance" standard, now the exclusive rule under *Strickland v. Washington,* counsel's failure to accept the "open opportunity" offered by the trial judge must be viewed in a far different light. It is petitioner's contention that the failure to accept this invitation and offer the particular tape into evidence fell below "an objective standard of reasonableness," as set forth in *Strickland.* This was especially true when the jury had actually seen the tape, and the trial judge had instructed that "the defendant wanted to offer a tape of a conversation with the witness . . . and I concluded that if we do receive this tape it would be more appropriate if we receive (it) later in the trial in the defendant's case and not now. . . ."

As noted, the tape in question directly contracted Groppe's testimony at the trial that he had done "collection work for Mr. Nathan. . . . ," that he had never told

Mr. Nathan that a statement to that effect to the IRS "wasn't true . . . ," and that an IRS agent had not "pressured" him into lying that he had collected for petitioner. The significance of the issue of this tape is best reflected by the jury's note, during deliberations, stating that it "would like to hear tape or tapes which defendant submitted to court if it is on record as an exhibit." The court wrote on the note that: "The tape was not received into evidence and therefore is not part of the record."

Not only did the trial attorney's decision not to offer the tape prevent the jury from hearing a flat contradiction of sworn crucial testimony by a key prosecution witness, but it seriously undermined the defense's credibility in an area of expressed particular interest to the jury. The latter's deep interest in the tape was obvious, and trial counsel's failure to avail himself of the opportunity afforded him by the court of offering it in evidence was "in light of all the circumstances . . . outside the wide range of professionally competent assistance . . ." *Strickland,* 104 S.Ct. at 2064.

The Government in the Circuit Court took the position that the decision by defense counsel was a "strategic choice by counsel" and did not rise to the level of unreasonable professional conduct. The claim by the Government that the omission to offer the tape in question was merely a reasonable strategic choice by counsel must be examined by this Court in light of all of the circumstances surrounding the trial of the case.

Shortly before the trial, the petitioner was hospitalized for eye surgery which consisted of a repair of a torn retina. Because of his physical condition and inability to assist defense counsel at his trial, petitioner requested defense counsel to ask for an adjournment of the trial so

that he could recover from his recent surgery. No such request was made by defense counsel who advised petitioner that any such request would anger the District Court Judge and upset the court schedule. Thus, the trial was commenced with a defendant who was suffering from a physical disability which hindered his ability to participate at trial.

Thereafter on the evening before the trial was to commence, defense counsel, Louis Bender, advised the petitioner that there was a possibility of a conflict of interest in his representation of petitioner. The nature of the conflict which the petitioner was advised of at that time, by defense counsel was that the conflict consisted of the fact that defense counsel represented a client of one, Mr. Katzman, in an unrelated Internal Revenue Service matter.

Mr. Katzman was a potential Government witness and was a potential defense witness from whom a notarized statement had previously been obtained. Katzman was one of petitioner's accountants during the period in question.

As stated above, petitioner was advised on the eve of trial that the potential conflict was that defense counsel was representing a client of Mr. Katzman.

The true nature of the conflict, which petitioner never clearly understood until after the trial, was that the defense counsel was not representing a client of Mr. Katzman but was in fact *representing Katzman himself* who was under investigation by the I.R.S.

The Government was aware of the conflict prior to trial as was defense counsel since the prosecutor had discussed it with Bender. The only people unaware of the

conflict were the defendant and the trial court to whom the true nature of the conflict was never revealed. This was simply a case of "fool the judge, fool the client." Unfortunately the fooled client was left without counsel.

Katzman was never called by the Government as a witness but also was never called by defense counsel (nor were any other witnesses called by defense counsel including the defendant who had desired to testify, IRS Agent Keer who had worked with Katzman, Ted Mate, another of petitioner's accountants and others, and cross-examination of those witnesses called by the Government were minimal at best), and thus the question of examining Katzman did not arise again during the course of the trial.

It is against this background that the Court must examine and decide whether or not the failure of defense counsel to introduce the Groppe tape was merely a strategic choice or whether such failure rose to a level of unreasonable professional conduct. The background consisting of a physically impaired defendant, a defense counsel whose cross-examination was minimal at best and who presented no defense whatsoever and who had a serious conflict of interest and divided loyalties. It must be again emphasized that any witnesses called and any testimony by the defendant would have clearly been damaging to the defense counsel's other client, Katzman who was himself a potential witness.

The initial attempt to introduce the Groppe tape was denied by the District Court Judge but the door was left open for counsel to introduce the tape at a later time. The tape recording could certainly have been introduced on a defense case with proper foundation since the conversations on the tape purportedly took place between Groppe, a key government witness, and the defendant; but in order

to introduce this tape, the defense would have had to present some witnesses to lay the proper foundation for the tape. Since Groppe had already been examined, the logical witness for the defense to lay a foundation in the introduction of the tape would have been the defendant himself, who had always exhibited a desire to testify on his own behalf. But, if defense counsel chose this route, it would develop into a situation where the testimony would be broadened into areas which would involve and implicate Katzman, counsel's other client. This was the dilemma facing defense counsel at the time.

To say that the failure to introduce the Groppe tape which the jury was aware of and which counsel had attempted to introduce during cross-examination of Groppe, was merely a strategic choise is absurd. It should be clear from the background of this case and the atmosphere that existed, that this failure rose well above the level of reasonable professional choice and has clearly reached a level which consists of a violation of the defendant's rights.

Katzman, was, together with one Sanford Katz, the certified public accountant, in charge of the books and records of petitioner's business for the tax years in question, and it was the petitioner's position, that if any errors had been made, same were made by Katz and Katzman who were in charge of the keeping of petitioner's books and records.

When petitioner hired defense counsel, Louis Bender, petitioner advised counsel of the above position and of the fact that Katz and more particularly Katzman who had been meeting with Internal Revenue agent Kerr for more than one year, bore responsibility for any errors in bookkeeping. Counsel, Louis Bender, insisted on, and was

paid, $25,000, stating that the case would require at least three weeks of trial work, with participation by other attorneys in his office. This long trial would be necessary, since counsel stated, he intended to call many witnesses, including katzman and petitioner. Instead of a three week trial with defense witnesses, petitioner received a trial of two days, with counsel, who never called any witnesses, because he was hamstringed, by a severe conflict of interest and divided loyalty to two clients, the petitioner and the prime witness for the petitioner. Unfortunately, counsel's loyalty to his other client Katzman, won out when counsel at the start of the trial coerced petitioner into signing three waivers under the threat that if same were not signed, the presiding Judge, Bonsal, would revoke petitioner's bail and immediately incarcerate him and that he would not give petitioner back the $25,000 fee previously paid.

Defense counsel never provided a defense for the petitioner at the trial of this case. Defense counsel never introduced the Groppe tape, a crucial piece of evidence. Defense counsel never called Katzman, the accountant, to the witness stand. Defense counsel never called petitioner nor any other witness to testify. In fact, defense counsel did nothing. In reality, the petitioner had no counsel, since Bender's loyalty and concern lay with Katzman, his other client, against whom an IRS investigation was dropped after petitioner's conviction.

The Court of Appeals in its decision makes note of the fact that "Nathan's version, if accurate, suggests that Nathan did not seek to evade taxes. . . ." We agree with this finding of the Appeals Court, but how could Nathan prove his version when counsel refused to call any witnesses or take any steps that would endanger his other client, Katzman, the accountant responsible for Petitioner's

problem, for whom he was busy making a deal with the Government.

It was Katzman along with Katz the accounant for Petitioner who were responsible for not making bookkeeping entries reversing stale checks and for not keeping Petitioner's books current. This could have easily been shown at trial but was not since to do so would require calling witnesses who would be damaging to Katzman.

The Petitioner in effect had no trial counsel since throughout the trial counsel was representing the interests of his other client, Katzman and not the Petitioner.

Certainly Bender's conduct and the reasons for his actions caused his conduct to fall far below that of reasonably competent assistance. No reasonably competent trial lawyer would have so conducted himself.

CONCLUSION

For the foregoing reasons, petitioner, Jack Nathan, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JACK NATHAN
Petitioner, Pro Se
201 East 16th Street
New York, New York
(212) 533-3300

APPENDIX A—MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of November, one thousand nine hundred and eighty-five.

Present:
HONORABLE ELLSWORTH A. VAN GRAAFEILAND
HONORABLE JON O. NEWMAN,
Circuit Judges.
HONORABLE INZER B. WYATT,
District Judge.*

JACK NATHAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

85-6226

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED NOV 21 1985
ELAINE B. GOLDSMITH, CLERK

ORDER

*Of the United States District Court for the Southern District of New York, sitting by designation.

Jack Nathan appeals from an order of the District Court for the Southern District of New York (John E. Sprizzo, Judge) denying his petition for a writ of error *coram nobis* to overturn his 1975 conviction for tax evasion, in violation of 26 U.S.C. §7201. Nathan alleges that his trial counsel's failure to impeach a Government witness with a certain tape recording denied him the effective assistance of counsel guaranteed by the Sixth Amendment. Because this contention is without merit, we affirm.

Nathan operated a bill collection agency. Any amounts received from debtors of the agency's clients were deposited in full in the agency's bank account. After deduction of a thirty-five percent fee, the balance was forwarded to the client in the form of a refund check. Nathan's tax evasion scheme consisted of two elements. First, stale refund checks were carried on the agency's books as expenses even though they had not been cashed after long periods of time. Second, expense deductions were taken for purported refund checks that Nathan merely exchanged for cash. *See United States v. Nathan,* 536 F.2d 988, 990 (2d Cir.), *cert. denied,* 429 U.S. 830 (1976).

Leonard Groppe, the credit manager of a hotel for which Nathan's agency did collection work, testified that his hotel cashed checks for Nathan from time to time. Nathan claimed that he returned the cash to Groppe as a gratuity, for which an expense deduction was available. Groppe admitted receiving money from Nathan but claimed that this was payment for collection work that Groppe had performed for Nathan's firm. Nathan's version, if accurate, suggests that Nathan did not seek to evade taxes by the check-cashing method outlined above.

The defense sought to offer a tape recording to impeach Groppe, in which Groppe admitted to Nathan that

he had never performed collection work for Nathan's firm. Since defense counsel could not then satisfactorily answer the trial judge's inquiries concerning the tape, the trial court deferred its admission. We upheld this deferral on appeal. *See id.* at 991-92. Nathan argues that defense counsel's failure to reoffer the tape constituted ineffective assistance of counsel. Nathan's claim must fail because he cannot demonstrate ineffective assistance or prejudice as required by *Strickland v. Washington,* 104 S.Ct. 2052 (1984).

Defense counsel's actions apparently resulted from a tactical judgment that the tape would have little impeaching effect once the trial had proceeded and Groppe's testimony had become stale. There was also a danger that introduction of the tape would harm Nathan, since part of the conversation could be interpreted to suggest that Nathan was attempting to pressure Groppe into telling a story favorable to the defense. Trial counsel's assistance was not ineffective under *Strickland's* reasonableness test. *See id.* at 2066.

Moreover, the cash that Nathan claims he gave to Groppe as a gratuity accounts for only a small portion of the deductions taken as a result of the check-cashing device. There was ample evidence to suggest that the other monies received by Nathan were improperly listed as deductions. *See United States v. Nathan, supra,* 536 F.2d at 991. There was also ample evidence to support the claim that Nathan improperly carried stale refund checks as expenses, which is totally unrelated to Groppe's testimony. *See id.* at 990. There is no "reasonable probability" that, even if counsel had made a different decision, "the result of the proceeding would have been different." *Strickland v. Washington, supra,* 104 S.Ct. at 1068.

The order of the District Court is affirmed.

s/ E.A. Van Graafeiland

s/ Jon O. Newman

s/ Inzer B. Wyatt

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

APPENDIX B—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR A REHEARING AND SUGGESTION FOR A REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of March one thousand nine hundred and eighty-six.

JACK NATHAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Docket No. 85-6226

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant Jack Nathan, pro-se,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk